A **PACIFIC & ORIENT INSURANCE CO BHD**

v.

MUNIAMMAH MUNIANDY

B HIGH COURT MALAYA, KUALA LUMPUR
MOHAMAD ARIFF YUSOF J
[ORIGINATING SUMMONS NO: D-24 NCC-107-2010]
27 MAY 2010

C ***CIVIL PROCEDURE:*** *Injunction - Injunction to restrain presentation of winding-up petition - Judgment sum paid into court and stay of execution not obtained - Whether principles governing grant of Fortuna injunction applicable - Whether presentation of petition would cause irreparable damage to plaintiff - Whether plaintiff to pay up judgment* D *sum in the absence of stay - Companies Act 1965, s. 218*

COMPANY LAW: *Winding-up - Petition - Injunction to restrain presentation of petition - Judgment sum paid into court and stay of execution not obtained - Whether principles governing grant of Fortuna* E *injunction applicable - Whether presentation of petition would cause irreparable damage to plaintiff - Whether plaintiff to pay up judgment sum in the absence of stay - Companies Act 1965, s. 218*

This was the *inter partes* hearing of the plaintiff's *ex parte* injunction order obtained by the plaintiff restraining the defendant from F presenting a winding-up petition against it based on a judgment sum. The plaintiff had paid the judgment sum into court as required within the two weeks from the date of the *ex parte* order. At the instant stage, the defendant had already served the plaintiff a s. 218 notice under the Companies Act 1965 and the plaintiff G failed to pay the judgment sum to the defendant within the statutory 21-day period of receipt of the notice. The plaintiff's appeal against the judgment sum was pending before the Court of Appeal. The plaintiff failed to obtain a stay of execution at the High Court and its stay application was also before the appellate H court.

Held (dismissing plaintiff's application):

(1) A commercial court must decide whether a company I threatened with a winding up petition was solvent and could pay the debt concerned. The court must also be mindful of the serious commercial consequences to the company if the winding-up proceedings were allowed to proceed. In the

present circumstances, the plaintiff had paid the full judgment sum into court and to that extent it could not be concluded that it was unable to pay the debt just because it had been served with a s. 218 notice and that the defendant had not been paid. The plaintiff was also a listed company on Bursa Malaysia and must announce immediately any commencement of winding-up proceedings as per the listing requirements of Bursa with its attendant consequences. The plaintiff could pay directly to the defendant the full judgment debt but had chosen instead to pay the entire sum into court to preserve its statutory right of appeal. The question was whether, in those circumstances, it would be commercially just to allow the defendant to proceed with the winding-up proceedings. (paras 5 & 11-12)

(2) The two principles governing the grant of a Fortuna injunction were (a) that the presentation of the petition might produce irreparable damage to the company and the proposed petition had no chance of success or (b) that a petitioner proposing to present a petition had chosen to assert a disputed claim by a procedure which might produce irreparable damage to the company rather than by a suitable alternative procedure. In the present case, the defendant had a judgment after a full trial which had not been stayed. With the judgment in the defendant's favour, the first branch of the said governing principles was not legitimately satisfied. Likewise there could be no element of a "disputed claim" falling within the second branch. The presentation of the winding-up petition might cause commercial harm and damage to the plaintiff but the short answer to that would surely be for the plaintiff to pay up the judgment sum in the absence of a stay of execution. Since the plaintiff was, by its own admission, a very solvent company, that should not be a major issue.

[Discharging ex parte order. Costs of RM15,000 to defendant. Monies paid into court to be released to plaintiff.]

Case(s) referred to:

Fortuna Holdings Pty Ltd v. The Deputy Commissioner of Taxation [1978] VR 83 ***(refd)***

Maril-Rionebel (M) Sdn Bhd & Anor v. Perdana Merchant Bankers Bhd & Other Appeals [2001] 3 CLJ 248 CA ***(refd)***

Mobikom Sdn Bhd v. Inmiss Communication Sdn Bhd [2007] 3 CLJ 295 CA ***(refd)***

Safeguards Corporation Sdn Bhd v. Rampai Town Centre Sdn Bhd [2008] 5 CLJ 629 HC ***(refd)***

SBSK Plantations Sdn Bhd v. Dynasty Rangers (M) Sdn Bhd [2002] 2 CLJ 329 HC ***(refd)***

Tan Kok Tong v. Hoe Hong Trading Co Sdn Bhd [2007] 2 CLJ 305 CA ***(refd)***

Legislation referred to:
Companies Act 1965, ss. 217(1)(b), 218(1)(e)

For the plaintiff - Melvin Selvam; M/s Jagjit Singh & Co
For the defendant - Brijnandan Singh (Shailender Bhar with him); M/s Brijnandan Singh Bhar & Co

Reported by Usha Thiagarajah

JUDGMENT

Mohamad Ariff Yusof J:

[1] The primary facts before me are quite commonplace. The plaintiff/applicant applied to this court for injunctive relief to restrain the defendant from filing a Winding-Up Petition against it. The defendant/respondent has a judgment already in its favour and is seeking to enforce the judgment by resorting to winding-up proceedings. The defendant has, at this stage, served a s. 218 notice under the Companies Act on the plaintiff. The plaintiff has failed to pay the judgment sum within the statutory period of 21 days of receipt of the notice. The plaintiff applies to the court for injunctive relief to restrain the defendant from proceeding further. The plaintiff has filed an appeal to the Court of Appeal against the judgment, but at this stage has not obtained a stay of execution on the judgment. This court is informed that an application for stay in the Court of Appeal is pending, but in the meanwhile, the plaintiff has paid the full judgment sum into court.

[2] There was a previous stay application before the High Court; the plaintiff's application was dismissed.

[3] The plaintiff is a large insurance company which is listed on Bursa with a healthy balance sheet position, and according to plaintiff's counsel can pay the relatively small damages awarded against it by the judgment. The full judgment sum which is the subject of the s. 218 notice is RM89,374.03. The plaintiff has a total asset in excess of RM600 million with total liabilities of slightly more than RM168 million.

[4] On 20 April 2010, I heard the *ex parte* application by the plaintiff/applicant and allowed the application for injunctive relief to restrain the defendant from presenting a Winding-Up Petition on the usual undertaking as to damages, and requirement that the Plaintiff must pay the judgment sum into court within two weeks from the date of this court's order. That judgment sum has been paid into court.

[5] Parties are now before me on the *inter partes* hearing. I am mindful of the line of authorities that support the principle that the court should refuse injunctive relief where there is a definite judgment sum on which there is no stay of proceedings, although there has been an appeal filed. It is said, in such a fact situation, there does not exist a *bona fide* dispute as to the debt on substantial grounds. The filing of an appeal, of course, is evidence of the debt being disputed, but in law that dispute, in the absence of a stay, cannot be regarded as a *bona fide* dispute on substantial grounds.

[6] There is also very strong authority in support for a broad general jurisdiction of the courts to grant injunctive relief on the basis of the principles as stated in the celebrated Australian case of "The Fortuna", from which the term "Fortuna injunction" is derived. See *Fortuna Holdings Pty Ltd v. The Deputy Commissioner of Taxation* [1978] VR 83. I am here referring to the Court of Appeal decisions in *Mobikom Sdn Bhd v. Inmiss Communication Sdn Bhd* [2007] 3 CLJ 295 and *Tan Kok Tong v. Hoe Hong Trading Co Sdn Bhd* [2007] 2 CLJ 305, and the recent High Court decision in *Safeguards Corporation Sdn Bhd v. Rampai Town Centre Sdn Bhd* [2008] 5 CLJ 629. There are two principles in relation to the grant of a Fortuna injunction, firstly, where there is clearly a disputed claim where the defendant is using a procedure which will invariably produce irreparable damage to the plaintiff's company rather than by a suitable alternative procedure, and secondly, where the Winding-Up Petition, if presented, would have no chance of success since the debt is disputed on substantial grounds.

[7] It has to be stressed that on an *inter partes* hearing of this nature, the test to be employed is not "serious question to be tried", namely the *American Cyanamid* test, but the higher standard specified in the two principles above.

[8] The defendant has strongly resisted this application, and has highlighted that line of authority I have mentioned above, that an appeal does not operate as a stay of execution, and the respondent is entitled as of right to present a Winding-Up Petition pursuant to ss. 217(1)(b) and 218(1)(e) of the Companies Act, and the court cannot deprive the defendant of the right, or reduce the extent of the right, by exercise of its inherent jurisdiction. Counsel for the defendant relied very strongly on the High Court decision in *SBSK Plantations Sdn Bhd v. Dynasty Rangers (M) Sdn Bhd* [2002] 2 CLJ 329, and an English Chancery Division decision in *Cornhill Insurance Plc v. Improvement Services Ltd* [1986] 1 WLR 114. In *SBSK Plantations*, *supra*, it was held, *inter alia*:

> Upon the Defendant obtaining the judgment, the debt ceases to be a disputed debt. Thereafter, the question whether the debt is a *bona fide* disputed debt, becomes a non-issue. This is so even though the Plaintiff has filed an appeal against the judgment because of filing of an appeal does not have the effect of reverting the status of the judgment debt to its original status as a disputed debt before judgment was obtained. (At page 339 of the report)

[9] The view expressed in *Cornhill Insurance* is even more limited. Harman J had this to say:

> In my view the correct test in approaching these matters is exemplified first by Ungeod-Thomas J, who was a great master of equity (and I, it must be remembered, am being asked to exercise the ordinary equitable remedies, not the Company's Court remedies), in *Mann v. Goldstein* [1968] 2 All ER 769 when he said:
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> > When the Creditor's debt is clearly established it seems to me to follow that this Court would not, in general at any rate, interfere even though the company would appear to be solvent, for the Creditor would as such be entitled to present a petition and the Debtor would have his own remedy in paying the undisputed debt which they should pay. So, to persist in non-payment of the debt in such circumstances would itself either suggest inability to pay or that the application was an application that the court should give the Debtor relief which it itself could provide, but would not provide, by paying the debt.
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> That appears to me to be sound reasoning and sound law. I reinforce it by a reference to *In re A Company* ... in a matter in which counsel of the utmost distinction in Chancery at that time, both leading and junior, appeared, said that when a company was

well-known and wealthy it was the more likely that delay in settlement of its obligations would create some suspicion of financial embarrassment:

> Rich men and rich companies who did not pay their debts had only themselves to blame if it were thought that they could not pay them.

In my view those words apply to this case also. This is a case of a rich company which could pay an undoubted debt and has chosen - I think I must use that word - not to do so ... In my view in such circumstances the Creditor was entitled to (a) threaten to and (b) in fact if it chose to present a Winding-Up Petition, and I was wrong to make the *ex parte* order which I made ... and I should not accede to this motion to continue that order today.

[10] It is therefore seems from *Cornhill Insurance* that "rich companies", that would not pay their debts, had only themselves to blame if it were "thought" that they could not pay them.

[11] With due respect, I must say there are strong arguments which can be marshalled against adopting such a mechanistic view of the law in relation to the presentation of the Winding-Up Petition. Just because a s. 218 notice has been served, that by itself would fulfil all the requirements of the law, irrespective of the peculiar factual circumstances of the case. To rely on a mere "thought" that the solvent company might be unable to pay its debt, will be, in my view, to miss the wood for the trees. In the ultimate analysis, a commercial court must decide, as it should, whether the company threatened with the Winding-Up Petition against them or Winding-Up Petition has been presented, is solvent and can pay the debt. The court must also be mindful of the serious commercial consequences which will be visited upon the company, if winding-up proceedings are allowed to be mechanistically filed and proceeded. Take the present circumstances, for instance. The plaintiff has paid the full judgment sum into court, and to that extent, it will be the height of literalism to conclude that the defendant is entitled to "think" that the plaintiff is unable to pay its debt just because a s. 218 notice has been served on it and it has not paid the defendant pursuant thereto.

[12] The plaintiff is also a listed company on Bursa Malaysia. I need also be mindful that it must announce immediately any commencement of winding-up under the listing requirements of

Bursa, with its attendant consequences. The plaintiff can of course choose to pay directly to the defendant the full judgment debt, but it has chosen instead to pay the entire sum into court to preserve its statutory right of appeal. In these circumstances, will it be commercially just to allow the defendant to proceed with winding-up proceedings? The Court of Appeal in *Maril-Rionebel (M) Sdn Bhd & Anor v. Perdana Merchant Bankers Bhd & Other Appeals* [2001] 3 CLJ 248 has held that a petition for winding-up is not an execution, for it is not necessarily based on any judgment of a court, and further, the issuance of a s. 218 notice is not a *sine qua non* for its presentation. Such being the case, in the circumstances of this case, will it not be more appropriate for the defendant to resort to the more suitable alternative procedure or other forms of execution which will not produce irreparable damage to the plaintiff's company, rather than winding-up proceedings? In any event, the full judgment sum has been paid into court, and so the argument on inability to pay the debt is conclusively answered as a matter of fact.

[13] Nevertheless, I am bound by the settled principles as decided by the case authorities. To recapitulate, there are two "branches" to the Fortuna principles, namely:

(a) the presentation of the petition might produce irreparable damage to the company and the proposed petition has no chance of success; or

(b) a petitioner proposing to present a petition has chosen to assert a disputed claim, by a procedure which might produce irreparable damage to the company rather than by a suitable alternative procedure.

[14] These principle here, has been recognised by our Court of Appeal in *Mobikom Sdn Bhd v. Inmiss* case *(supra)*.

[15] The underlying principles supporting these two "branches" is likewise stated in *Fortuna* as the prevention of oppression and abuse of court process: "The principle enables companies to be protected from threatened or apprehended oppression and damage from abuse of court's process."

[16] If, I may summarise and rephrase the two "branches", they can be conveniently described as (a) "the production of irreparable damage with no chance of success" principle and (b) "the

assertion of a disputed claim, producing irreparable damage without resort to suitable alternative procedure" principle. Broad as the Fortuna principles may seem, they are also quite limited in application.

[17] On the facts here, the defendant has a judgment in hand and after full trial, at that, which has not been stayed. With this judgment already recorded in its favour, it cannot be legitimately concluded that the first "branch" can be satisfied. Likewise, there can be no element of a "disputed claim" falling within the second branch. The presentation of a Winding-Up Petition may cause commercial harm and damage to the company, but the short answer to this surely has to be for the company to pay up the judgment sum, in the absence of a stay of execution. Since the plaintiff is, by its own admission, a very solvent company, this should not be a major issue.

[18] In the circumstances, I am dismissing this application by the plaintiff for an interlocutory injunction and discharging the *ex parte* order dated 20 April 2010 granted by this court. Costs of RM15,000 to be paid by the plaintiff to the defendant within one month from the date of this order. Further order that the monies paid into court, be released to the plaintiff.